

REMARKS/ARGUMENTS

Applicants submit this amendment after final pursuant to Rule 116, in response to the Office Action dated October 3, 2006. Claims 1-23 currently remain pending in the present application. By the amendments presented, claims 1, 9, 10 and 22 have been amended. None of these amendments add new matter to the claims.

The Examiner has rejected pending Claims 1, 4-7, 9 and 17-19 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 3,482,863 ("DeVane"). Claims 1, 4-14, and 17-21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 4,142,337 to Holcomb and U.S. Patent No. 5,727,264 to Craig et al. Finally, claims 2, 3, 15, 16, 22, and 23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Holcomb and Craig and in further view of U.S. Patent No. 4,090,266 to Price. Applicant notes that these are the same rejections made previously in the March 13, 2006, Office Action.

Rejection under 35 U.S.C. § 102(b)

Because Applicant's prior arguments did not persuade Examiner to withdraw the rejections, Applicant has amended Claims 1, 9 and 22, add limitations such that the claimed integrated spillway and flange are "substantially above the horizontal plane of the pool," and that the claimed spa assembly is "for use in combination with a pool." Applicant believes these added limitations sufficiently distinguish the claimed invention from the prior art references, and places the application in condition for allowance.

In the October 3, 2006, Office Action, the Examiner contends that DeVane anticipates Claims 1, 4-7, 9, and 17-19, stating "[t]he DeVane reference discloses a spa assembly comprising: a shell including a tub portion 10, a flange 12 and a spillway (Fig. 3); and plumbing elements including a suction 23 and a return 18, as claimed." In the Applicant's August 31, 2006, Response to the March 13, 2006, Office Action, Applicant argued that DeVane did not disclose the present invention because DeVane fails to describe a spillway between a spa and a pool, which is integral to Applicant's invention. Examiner has countered that there is no 'pool' recited as part of the combination set forth in claim 1. In response, Applicant has clarified claim 1 to include the limitation that the claimed spa assembly is "for use in combination with a pool." Applicant believes this added distinction sufficiently distinguishes Applicant's invention from that disclosed in DeVane. Additionally, Applicant believes there is no equivalent disclosure in DeVane. Because

Applicant's invention falls outside the scope of DeVane, DeVane is no longer a Section 102(b) reference, and claims 1, 4-7, 9 and 17-19 should be placed in condition for allowance.

Rejection under 35 U.S.C. § 103(a)

As noted above, the Examiner posits that claims 2, 3, 15, 16, 22 and 23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Holcomb and Craig, as applied to claims 1 and 9. As stated by the Examiner, Holcomb "discloses a spa assembly comprising: a shell including a tub portion 12 and a flange 13; and plumbing elements including a suction 19 and a return 18." Craig "discloses an analogous spa assembly which further includes a shell 18 having a spillway 50." Examiner contends that "it would have been obvious to one of ordinary skill in the art to associate a spillway with the Holcomb shell in order to enable installation adjacent to a swimming pool." Further, "it would have been obvious to one of ordinary skill in the spa assembly art to associate operating controls with the Holcomb spa assembly in order to facilitate operation." Finally, in light of Price, the Examiner has rejected claims 2, 3, 15, 16, 22, and 23, stating that "Price teaches one how to install appearance-enhancing tiles on a swimming pool sidewall."

Applicant reiterates that notwithstanding the titles of the cited prior art references, there is no express or implied motivation to combine the teachings of Holcomb, Craig and Price because the three disclosures describe three different systems for three different purposes. Additionally, even if one were to combine the teachings of the three cited prior art references, the resulting product would still fall short of Applicant's invention. As a preliminary matter, however, the Examiner assumes that "a spa is mostly just a smaller version of a swimming pool." This broadly mischaracterizes the purpose of these two systems. A spa, or hot tub, is often used for resting, relaxing and warming the swimmer, whereas a swimming pool invites exercise and active recreation. Indeed, the purpose of Applicant's invention is to provide swimming pool owners the added benefit of an adjacent spa or hot tub in instances where a pool has already been, or is to be, constructed. The added plumbing, tiling and fixture properties of such a spa addition differentiate one system from the other, such that a spa and a pool are readily distinguishable. Applicant has highlighted this distinction with the amendments to claims 1, 9 and 22.

Holcomb describes a spa assembly where the shell of the spa is situated so that the spa lip rests on stakes (Holcomb col. 1, line 64), such that the upper lip of the Holcomb spa "is substantially flush with the ground surface grade 15 or level" (col. 2, lines 67-68). Craig discloses

a pool/spa system formed by a “continuous, totally homogenous concrete bond,” where “[t]he spa utilizes the plumbing . . . facilities of the swimming pool.” (Craig, col. 2, line 35-36, col. 4, lines 9-10). Price provides a swimming pool construction method, wherein panel members are used to form the walls of the pool. (Price, col. 1, line 58 – col. 2, line 16). If one were to combine the stand-alone spa assembly in Holcomb (Holcomb col. 3, line 55 – col. 4, line 20), with the X-brace concrete support system from Craig (Fig. 6) and the wall assembly from Price (col. 1, line 50 – col. 2, line 16), the resulting structure would not be the integrated spa having the unique spillway, raised flat upper lip, gunite spa cavity and in-shell plumbing elements disclosed in Applicant’s amended claims 1, 9, 22 and the rest of Applicant’s application. As such, the cited prior art does not support a Section 103(a) rejection, and the subject claims should be allowed.

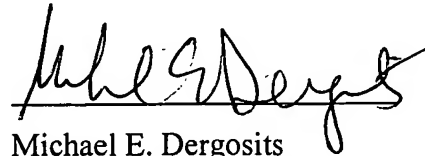
CONCLUSION

Applicant requests that the Examiner accept these claims and approve issuance of the instant application.

Respectfully submitted,

DERGOSITS & NOAH LLP

By:



Michael E. Dergosits
Registration No. 31,243

Dated: March 5, 2007

Please direct correspondence to:

Michael E. Dergosits
Dergosits & Noah LLP
Four Embarcadero Center, Suite 1450
San Francisco, California 94111
(415) 705-6377